

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

STATE OF MISSOURI,

Respondent

v.

WILLIAM CLINCH.

Appellant

DOCKET NUMBER WD71869

DATE: March 22, 2011

Appeal From:

Circuit Court of Boone County, MO
The Honorable Gary M. Oxenhandler, Judge

Appellate Judges:

Division Three
Cynthia L. Martin, P.J., James Edward Welsh, and Gary D. Witt, JJ.

Attorneys:

Craig A. Johnston, Columbia, MO

Counsel for Appellant,

Attorneys:

Shaun J. Mackelprang, Jefferson City, MO

Counsel for Respondent,

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

**STATE OF MISSOURI, Respondent, v.
WILLIAM CLINCH, Appellant**

WD71869

Boone County

Before Division Three Judges: Martin, P.J., Welsh, and Witt, JJ.

William Clinch appeals the circuit court's judgment convicting him of first-degree murder. In his points on appeal, he claims that the court erred in overruling his motion to dismiss the case with prejudice based upon the State's bad faith in entering a *nolle prosequi* and refiling the same charges solely for the purpose of obtaining a different judge. Clinch also contends that the court erred in overruling his objection to the use of the word "imminent" in the defense of others instruction. Lastly, Clinch claims that the court erred in refusing to allow his brother to testify after his brother violated the rule excluding witnesses from the courtroom.

AFFIRMED.

Division Three holds:

The circuit court did not err in overruling Clinch's motion to dismiss the case based upon the State's entering a *nolle prosequi* after an unfavorable ruling and refiling the charges to obtain a different judge. Our common law affords the State broad discretion to dismiss a case and refile the charges so long as jeopardy has not attached. Jeopardy had not yet attached in this case, so the State was free to dismiss the charges and refile them as it saw fit.

The circuit court did not err in overruling Clinch's objection to the use of the word "imminent" in the defense of others instruction. The plain language of the defense of others statute, section 563.031, RSMo Cum. Supp. 2007, requires that, for a person to be justified in using deadly force to protect others from the commission of a forcible felony, the person must reasonably believe that the forcible felony is actually occurring or is imminent.

The circuit court did not err in refusing to allow Clinch's brother to testify after his brother violated the rule excluding witnesses from the courtroom. The court's statements indicate that it believed that Clinch's brother violated the rule with the defense's consent. Based upon the circumstances before the court, this belief was reasonable. Therefore, the court did not abuse its discretion in excluding Clinch's brother's testimony.

Opinion by James Edward Welsh, Judge

March 22, 2011

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